IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN,
JAIPUR BENCH, JAIPUR

1. Phool Chand v Hazari Lal
(S. B. Civil Misc. Appeal No. 534/ 2006)

2. Prem Narayan v Hazari Lal
(S. B. Civil Misc. Appeal No. 535/2006)

Date of Judgment: 4th APRIL, 2007

Hon'ble Mr. Justice R. S. Chauhan

Mr. Mahesh Gupta for the Appellants
Mr. Shailesh Prakash Sharma for the Respondent.

(Per Court):

Based on the same factual foundations, emanating from the same impugned order, these two appeals are being decided by this common Judgment. The appellants, the father and the son, are challenging the order dated 18-7-2005, passed by the District and Sessions Judge, Baran, whereby the learned Judge has set aside the judgment and decree dated 12-10-2004, passed by the Civil Judge (Senior Division) & Chief Judicial Magistrate, Shahbad, Dist. Baran and has remanded the case to the learned trial court for fresh decision.

For the sake of brevity, the facts are being taken from the first appeal, namely S. B. Civil Misc. Appeal No. 534/ 2006, Phool Chand v Hazari Lal. The appellant had filed a civil suit for permanent injunction and mandatory injunction against the respondent-defendant. According to the plaint, in the Village, Panchayat Kelwara, the appellant has a residential plot, which he had bought and is in his possession. Half of the said plot is in the possession and the ownership of his son, Prem Narayan. Thus, the entire plot is in the possession of the family. The family had also built a stone boundary wall around the said plot. They are using the said plot for residential purpose as well as for storing agricultural products and for keeping their animals. On 6-6-2003, the respondent, wanting to take forceful possession of the plot, broke the stone boundary wall. The respondent is, thus, trying to interfere with the appellant's peaceful possession of the property. Hence, the appellant and his son filed two separate suits for permanent injunction and mandatory injunction against the respondent with regard to their respective shares in the said plot.

The respondent initially filed his written statement and subsequently amended the same. He denied the averments made in the plaint. According to him, it is he who had been in adverse possession of the said plots for the last twenty years. Therefore, on the basis of adverse possession and on the basis of an auction held on 6-2-2002, the panchayat Kelwara had allotted the said plot to him. In accordance with the condition of auction, he had deposited Rs. 5,400/- with the panchayat. A sale deed was registered in his name and the possession of the plot was given to him. He claimed to be in possession of the plot. He further claimed that the “patta” (title deed) submitted by the appellant was a forged one.

On the basis of the pleadings, the learned trial court framed four issues. In order to prove his case, the appellant examined three witnesses and submitted three documents. In order to buttress his case, the respondent examined six witnesses and submitted three documents. After going through the oral and documentary evidence, vide two

separate judgments, both dated 12-10-2004, the learned Magistrate decreed the suits in favor of the two appellants before this court. Since the respondent was aggrieved by the judgments dated 12-10-2004, he filed two separate appeals before the District and Sessions Judge, Baran. Before the learned Judge, the respondent also filed an application under Order 41, Rule 27 of the Civil Procedure Code (henceforth to be referred to as ‘the Code’, for short) for submitting certain documents pertaining to the allotment of the plot by the panchayat Kelwara in his favor and for adducing additional evidence with regard to the said documents. By a common judgment, vide judgment dated 18-7-2005, the learned Judge not only allowed the application under Order 41, Rule 27 of the Code, but also set aside the judgments dated 12-10- 2004 and remanded the cases back to the learned trail court for fresh decision. Hence, these two appeals before this court.

Mr. Mahesh Gupta, the learned counsel for the appellants, has vehemently argued that under Section 107 of the Code, the appellate court has power of the original court

as well as the power to remand a case back to the trail court. Secondly, the documents, which the respondent wanted to produce before the appellate court, were readily available even during the suit proceedings. Therefore, he cannot be permitted to produce the said documents during the appellate proceedings. Thirdly, even if they had to be produced, the appellate court could have taken them on record and could have itself recorded the additional evidence with regard to the said documents and could have passed its judgment. In fact, there was no occasion for the appellate court to set aside the judgment and decree dated 12-10-2004 and to direct a de novo trial.

On the other hand, Mr. Shailesh Sharma, the learned counsel for the respondent, has strenuously argued that the documents sought to be produced by the respondent were not in his possession during the course of the suit proceedings. Despite his best efforts, the documents were not made available to him. Thus, he was precluded from submitting the same before the learned trial court. Therefore,

his case falls under Order 41, Rule 27 (aa) of the Code. Secondly, these documents, having been prepared by the panchayat, are not forged. Since they would throw a great light on the case, they are essential for doing substantial justice with the parties. Thirdly, in accordance with the directions of the learned appellate court, the trial court has started examining the witnesses. Once the learned trial court is seized of the case, this court should not disturb it.

We have heard the learned counsels and have perused the impugned order.

In the case of Niranjan Lal v U. I. T. Alwar & Ors (AIR 2007 Raj 18) this court had an occasion to elaborately discuss the scope and ambit of Section 107 of the Code read with Order 41, Rules 23 to 29 of the Code. In the said case, this court held as under:

> 16. A conjoint reading of these provisions would clearly reveal that under Section 107 (2) of the Code, the appellate court has the same power as the court of original jurisdiction. Moreover, according to Section 107 (1) of the Code, the appellate court has the power to frame the issues, to take additional evidence and to determine the suit.

17. Order 41, Rules 23 to 29 of the Code merely elaborate the power prescribed by Section 107 of the Code. Order 41, Rule 23 of the Code deals with a case where the trial Court has disposed of a suit upon a preliminary point and the decree is reversed in appeal. The appellate court may, if it thinks fit, by order remand the case, and may further direct the issues, which shall be tried in the case so remanded. The appellate court may further direct the trial court to readmit the suit under its original number in the register of civil suits. It may also direct the trial court to determine the suit and also declare that the evidence, if any, recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

18. Order 41 Rule 23-A of the Code grants the same power as under Order 41 Rule 23 of the Code, when the case is finally disposed of and the decree is reversed in appeal and a retrial is considered necessary. Considering the fact that the power under Order 41 Rules 23 and 23-A of the Code is vast in nature, the power should be exercised sparingly and in the rarest of the rare case. For, a denovo trial especially under Order 41 Rule 23-A of the Code would imply the trial to commence all over again from the initial stage. Since the civil trials are time consuming, since a denovo trial would again take the parties through the rigors of a civil trial, therefore, such a power should be resorted to in the rarest of the rare case.

19. Once, the case has come up to the appellate stage, according to Rule 24 of the

Code, if the evidence upon the record is sufficient to enable the appellate court to pronounce judgment, the appellate court may, after resettling the issues, if necessary, finally determine the suit. Hence, under Rule 24 of the Code, there is no necessity for the Court to remand the case back to the trial court. It can exercise the power, take additional evidence under Rule 27 of the Code for the resettled issues and decide the case finally itself.

20. According to Rule 25 of the Code, the appellate court may frame certain issues and refer them for trial to the trial court, in case the trial court has omitted to frame or try any issue or to determine any question of fact, which appears to the appellate court to be essential for just decision of the suit. The appellate court shall direct the trial court to take additional evidence as required and to return the evidence so recorded back to the trial court within the time frame fixed by the appellate court. Upon receiving such evidence under Rule 26(2) of the Code, the appellate court shall proceed to determine the appeal.

21. A bare perusal of Rules 24 and 25 of the Code clearly reveals that the appellate court should endeavour to decide the case at the appellate stage itself. However, in rare cases for just decision of the case, it may remand the case back to the trial court for recording of evidence on particular issue framed by it. But such recording should be done within the time frame fixed by the appellate court. Moreover, the evidence so recorded should be sent back to the appellate court for the final decision of the appeal.

22. The purpose behind the Rules is not to initiate de novo trial. The purpose is also not to prolong the dispute between the parties. Since the Judiciary must endeavour to decide the dispute as soon as possible, the appellate court is expected to decide the case at the appellate stage itself. Therefore, the tendency to remand the case in toto after setting aside the judgment of the trial court and the tendency to direct a denovo trial is against the tenor of law. The appellate court is expected to exercise its power within the confines to Rules 23 to 26-A of the Code. Ample powers have been given to the appellate court under Rules, 27, 28 and 29 of the Code to take additional evidence and to decide the issues reframed by it. Since the Trial Courts are the most overburdened Courts in the judicial hierarchy, the appellate court should refrain from remanding the case in toto in a routine manner. What can be done at the appellate stage, need not be remanded back to the trial courts. After all, the buck has to stop somewhere.

23. The poor litigant cannot be treated as a shuttlecock and forced to run from pillar to post, from court to court. The litigant expects the judiciary to decide its case at the earliest. The litigant neither has the financial means, nor the energy to go on a roller-coaster ride of litigations. The judiciary has to be sensitive to the financial condition and to the expectation of the litigant. To prolong a dispute endlessly is not only a disservice to the litigant, but it is an injustice to him. Therefore, this trend of remanding the case back to the trial court in a mechanical and routine manner has to stop. The learned District Judges, who are

experienced and knowledgeable, are
expected to do their duty by the litigant.

In the present case, the learned Judge had ample power to accept the documents, to frame the issues with regard to the documents, to take the addition evidence about the documents, if necessary, and to decide the case. Hence, there was no reason for the learned Judge to remand the case to the learned trial court. The tendency to pass the buck and the tendency to force the litigants to run from one court to another has to stop. Even if the learned trial court has started recording the evidence after the case was remanded back, the same cannot be allowed to continue. The learned Judge should have exercised a jurisdiction vested in him. Therefore, we direct the learned Judge to call for the record of both the civil suits, Civil Suit No. 2/2003, Prem Narain Vs. Hazari Lal and Civil Suit No. 3/2003, Phool Chand Vs. Hazari Lal from the court of Civil Judge (Sr. Division) Shahbad and to record the evidence with regard to the documents submitted by the respondent and to finally decide the case within a period of three months from the date of the receipt of the certified copy of this judgment.

With these observations, these appeals are allowed. There shall be no order as to costs.

(R.S. CHAUHAN) J.